CHUA AH MENG & ANOR v. TIAN KON SIONG

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
MARY LIM JCA
[CIVIL APPEAL NO: D-02(W)-886-06-2015]
24 JUNE 2019

LAND LAW: *Transfer – Validity – Sale and purchase of land – Whether transfer of land for security for loans – Whether genuine sale and purchase transaction – Whether allegation of forgery proven – Whether authenticity of signatures on documents established – Whether transfer of land valid – Whether subsequent owner obtained indefeasible title to land – National Land Code, s. 340*

The respondent ('plaintiff') was the registered owner of a piece of land ('Kluang land'). On 26 June 2007, the plaintiff registered Alam Rimba Resources ('Alam Rimba') as a business enterprise under the name of one of his employees, Syed Alwi. On 29 April 2008, the plaintiff and the second appellant ('second defendant') entered into a sale and purchase agreement in respect of the Kluang land for a consideration of RM3 million. The plaintiff executed two Forms 14A and a power of attorney on the same day. The plaintiff had received the amount of RM2,820,000. The original issue document of title ('IDT') of the Kluang land was given to the first appellant ('first defendant'). As it transpired, Syed Alwi resigned from Alam Rimba and subsequently, the plaintiff and the first defendant joined Alam Rimba. However, shortly thereafter, the plaintiff resigned and the plaintiff and the first defendant entered into a memorandum of agreement ('MOA') in respect of Alam Rimba. On 11 January 2011, the plaintiff demanded from the first defendant, a sum of RM16 million and the return of the issue document of title to the Kluang land and subsequently commenced proceedings against the first defendant. The crux of the plaintiff's case against the first defendant was that (i) the first defendant had allegedly promised to lend a sum of RM16 million to the plaintiff on the condition that the plaintiff withdrew himself from Alam Rimba; (ii) upon the plaintiff withdrawing himself from Alam Rimba, the first defendant promised to return the IDT to the Kluang land to the plaintiff. The IDT to the Kluang land was given to the first defendant as security for earlier loans made by the first defendant to the plaintiff; and (iii) the first defendant did not lend the plaintiff the sum of RM16 million although the plaintiff had withdrawn himself from Alam Rimba. The plaintiff's case against the second defendant was premised on the transfer of the Kluang land to the second defendant by the first defendant. The plaintiff alleged that the transfer was void and illegal as the instrument of transfer was obtained by misrepresentation and/or forgery. On the other hand, the first defendant counterclaimed against the plaintiff alleging that he was induced by the plaintiff through various representations to invest in Alam Rimba.

These representations were discovered to be false or fraudulently made. The first defendant alleged that he suffered losses due to the false representations. The High Court Judge held, *inter alia*: (i) the MOA was binding on the parties and the first defendant had paid the entire concession sum to the plaintiff; (ii) the transfer of the Kluang land was a form of security for loans provided by the first defendant to the plaintiff and ordered the defendants to return the Kluang land to the plaintiff and the registration of the second defendant as the registered owner be cancelled and the plaintiff be registered as the registered owner; and (iii) the counterclaim was dismissed on grounds that the subject had become academic. Hence, the present appeal in respect of part of the decision of the HCJ ordering the return of the Kluang land to the plaintiff and against the dismissal of the first defendant's counterclaim. The plaintiff's cross-appeal was against a part of the decision of the HCJ dismissing the plaintiff's claim for RM16 million.

Held (striking out plaintiff's cross appeal; allowing defendants' appeal with costs and allowing first defendant's counterclaim with costs)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) It is settled law that any cross-appeal must be restricted to vary only that part of the decision that was being appealed against and not any other part of the decision that does not form the subject of the appeal; r. 8(1) of the Rules of the Court of Appeal 1994. The plaintiff's cross-appeal was in respect of the HCJ's findings on the plaintiff's claim for RM16 million against the first defendant. Thus, the subject of the plaintiff's cross-appeal could only be pursued by filing a separate notice of appeal. There was no competent cross-appeal. (paras 24, 25 & 27)

(2) There was cogent and credible evidence of a genuine sale and purchase transaction between the parties. The transaction between the plaintiff and the first defendant was pursuant to a sale and purchase transaction in respect of the Kluang land. The MOA entered into between the parties was a separate transaction concerning Alam Rimba. The HCJ had failed to consider that the MOA made no reference whatsoever to the Kluang land. Thus, the HCJ had erred in his failure to appreciate that the transaction in respect of the Kluang land was separate and distinct from the MOA. (paras 30 & 35)

(3) The plaintiff's allegation of forgery was unsubstantiated. The plaintiff's witness testified that the disputed conveyancing documents had been submitted to the Department of Chemistry to verify the signatures on the documents. However, the document examiner, Encik Iskandar, was never called as a witness to testify on the authenticity of the signatures on the document. Neither was a report by Encik Iskandar tendered as evidence. Hence, the HCJ was right to draw adverse inference under

s. 114(g) of the Evidence Act 1950 against the plaintiff and was correct in finding that the signatures on the disputed conveyancing documents were the genuine signatures of the plaintiff. Consequently, the HCJ ought to have concluded that the transfer of the Kluang land from the plaintiff to the first defendant was valid and the subsequent transfer of the land to the second defendant was also valid. As a result, the second defendant had acquired an indefeasible title to the land pursuant to s. 340 of the National Land Code. (paras 36-40)

(4) There was no analysis of the subject matter of the counterclaim or reasons given by the HCJ for the decision on counterclaim. The HCJ failed to evaluate the oral and documentary evidence adduced by the first defendant to support their counterclaim. On the balance of probabilities, there was sufficient evidence to prove the first defendant's counterclaim and therefore, the counterclaim was allowed. (paras 47 & 55)

Case(s) referred to:

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 8 CLJ 149 FC ***(foll)***

Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors [2015] 3 CLJ 489 CA ***(refd)***

Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2016] 4 CLJ 510 CA ***(dist)***

Sajan Singh v. Sardara Ali [1959] 1 LNS 90 PC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)
Moneylenders Act 1951, s. 15
National Land Code, s. 340
Rules of the Court of Appeal 1994, r. 8(1)

For the appellant - Cecil Abraham, Sunil Abraham, Alex Tan Chie Sian & PL Cheah; M/s Wong Kian Kheong

For the respondent - Adrian Silvarajoo & Muhamad Atif Abdullah; M/s Ramli Yusuff & Co

[Editor's note: Appeal from High Court, Kota Bharu; Civil Suit No: 22-30-2011 (overruled).]

Reported by S Barathi

JUDGMENT

Badariah Sahamid JCA:

Introduction

[1] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

[2] This is an appeal against part of the decision of the learned High Court Judge delivered on 5 May 2015 after a full trial, where the learned judge made the following orders:

(i) the second defendant be registered as the owner of a piece of land held under Geran Mukim No. 2538, Lot No. 1299, Bandar Kluang, Daerah Kluang, Negeri Johor ("Kluang land") in the capacity of a trustee only;

(ii) the defendants to return the Kluang land to the plaintiff, whereby the registration of the second defendant as the registered owner be cancelled and the plaintiff be registered as the registered owner;

(iii) in the event of a failure of the second defendant to execute the transfer of the Kluang land to the plaintiff, the Senior Assistant Registrar to execute the transfer form on behalf of the second defendant;

(iv) the defendants' counterclaim be dismissed; and

(v) each party to bear their own costs.

Chronology Of Events

[3] The chronology of events leading to the dispute between the parties was set out in the defendants' submissions.

[4] The plaintiff is the registered owner of the Kluang land. On 26 June 2007, the plaintiff had registered Alam Rimba Resources ("Alam Rimba") as a business enterprise under the name of one of the plaintiff's employees, Syed Alwi bin Syed Omar.

[5] On 29 April 2008, the plaintiff and the second defendant entered into a sale and purchase agreement in respect of the Kluang land for a consideration of RM3 million. The plaintiff executed two Forms 14A and a power of attorney on the same day ie, 29 April 2008. The plaintiff had received the amount of RM2,820,000 The original issue document of title of the Kluang land was given to the first defendant.

[6] On 13 July 2008, the plaintiff's brother, Tian Chee Chon and the plaintiff's son, Tian Chuan Sen joined Alam Rimba. Thereafter, on 14 July 2008, Syed Alwi resigned from Alam Rimba.

[7] On 26 March 2009, Kompleks Perkayuan Kelantan Sdn Bhd ("KPK") issued a letter awarding Alam Rimba a concession to extract timber from 10,000 acres of land. KPK also entered into a formal agreement with Alam Rimba on the same day.

[8] On 1 April 2009, the plaintiff and the first defendant joined Alam Rimba whereas Tian Chee Chon resigned from Alam Rimba. On 2 April 2009, Tian Chuan Sen also resigned from Alam Rimba. On 23 April 2009, the plaintiff resigned from Alam Rimba.

[9] On 27 April 2009, the plaintiff and the first defendant entered into a memorandum of agreement in respect of Alam Rimba ('MOA').

[10] On 11 January 2011, the plaintiff, through his solicitors, Messrs Zainal & Mariani, demanded from the first defendant a sum of RM16 million and the return of the issue document of title to the Kluang land.

[11] On 27 February 2011, the plaintiff commenced proceedings against the first defendant in the Kota Bharu High Court.

[12] On 6 September 2011, the Kluang land was transferred to the second defendant. On 10 November 2013, the plaintiff amended his claim by joining the second defendant as a party to the proceedings in the Kota Bharu High Court.

Plaintiff's Claim Against The First Defendant

[13] The crux of the plaintiff's claim against the first defendant as set out in the amended statement of claim is as follows:

(i) the first defendant had allegedly promised to lend a sum of RM16 million to the plaintiff on condition that the plaintiff withdraws himself from Alam Rimba;

(ii) upon the plaintiff withdrawing from Alam Rimba, the first defendant promised to return the issue document of title (IDT) to the Kluang land to the plaintiff. It was alleged that the IDT to the Kluang land was given to the first defendant as security for earlier loans made by the first defendant to the plaintiff; and

(iii) the plaintiff had withdrawn himself from Alam Rimba on the defendant's representations. However, the first defendant did not lend the plaintiff the sum of RM16 million as promised.

Plaintiff's Claim Against The Second Defendant

[14] The plaintiff's claim against the second defendant is premised on the transfer of the Kluang land to the second defendant. The plaintiff alleged that the said transfer is void and illegal because the instrument of transfer was obtained by misrepresentation and/or forgery.

First Defendant's Counterclaim Against The Plaintiff

[15] The first defendant alleged that the first defendant was induced by the plaintiff through various representations to invest in Alam Rimba. These representations were discovered to be false or fraudulently made. As a result of the false representations and fraud, the first defendant had suffered loss and damage.

Proceedings Before The High Court

[16] In his grounds of judgment, the learned judge was of the view that there were two main issues to be determined by the court:

(i) whether the first defendant had paid the entire concession sum of RM16 million to the plaintiff?

(ii) whether the transfer of ownership of the Kluang land from the plaintiff to the first defendant is pursuant to a sale and purchase transaction or is a form of security for a loan transaction?

[17] On the issue of whether the first defendant had paid the entire concession sum of RM16 million to the plaintiff, the learned judge made the following findings:

(i) The first defendant had paid the entire concession sum to the plaintiff.

(ii) The memorandum of agreement ("MOA") entered into by the plaintiff and the first defendant on 27 April 2009 is binding on both parties. The MOA was signed with the consent of both parties. There was no false representation from the first defendant.

(iii) The terms of the MOA are clear. Para 1 confirms that the plaintiff had received the payment of RM16 million from the first defendant. The plaintiff was given until the end of October to transfer the concession to the first defendant in the event that the plaintiff fails to fulfil his obligations. As a consequence of the plaintiff's failure to fulfil his obligations, the first defendant became entitled to the concession in its entirety.

(iv) The plaintiff himself had admitted receiving the payment of almost RM16 million. The plaintiff's allegation that the RM16 million had not been paid is false.

(v) The first defendant had given the first loan to the plaintiff in the sum of RM3 million and thereafter, RM5 million. Subsequently, the plaintiff had also received payment from the first defendant which was admitted by the plaintiff, the total amount being RM16 million. The loan was valid and was confirmed by the MOA. The issue of illegality of the agreement is not pertinent in this case.

(vi) The first defendant is the owner of the concession.

[18] The second issue is whether the transfer of ownership of the Kluang land from the plaintiff to the first defendant is pursuant to a sale and purchase transaction or furnished as security for a loan given by the first defendant to the plaintiff? The learned judge made the finding that the transfer of the Kluang land was a form of security for loans given by the first defendant to the plaintiff.

[19] The decision of the learned judge on this issue was premised on the findings as follows:

(i) The purchase price of the Kluang land is RM3 million. The first loan given by the first defendant to the plaintiff is also RM3 million. The transfer of ownership was executed as soon as the first defendant paid the plaintiff. The first defendant had entered a caveat on the Kluang land after the payment of the first loan.

(ii) The first defendant did not send an assessment to the stamp office. There were two sets of Form 14A with two different dates.

(iii) The transfer was only remitted to the land office after the plaintiff filed this writ.

(iv) The transfer was sent to the land office after three police reports were made by the plaintiff.

(v) The plaintiff had signed both Forms 14A with full knowledge. There were no false representations by the defendants.

(vi) The transfer of the Kluang land by the plaintiff to the first defendant and the signing of the Forms 14A were done as a security for the loans provided by the first defendant to the plaintiff. After the MOA was executed, the defendants were obliged to return the Kluang land to the plaintiff who was registered in the capacity of trustee.

[20] On the grounds stated above, the learned trial judge made the finding that the transfer of the Kluang land was a form of security for loans provided by the first defendant to the plaintiff. The learned judge ordered the defendants to return the Kluang land to the plaintiff and for the registration of the second defendant as the registered owner be cancelled and the plaintiff be registered as the registered owner.

Judgment Of The Court

[21] Before us, we have an appeal against part of the decision of the learned judge, an appeal against the dismissal of the first defendant's counterclaim and a cross-appeal by the plaintiff.

[22] The appeal by the appellants/defendants is against the part of the decision of the learned judge ordering the defendants to return the Kluang land to the plaintiff and that the said land be registered in the name of the plaintiff. The appeal against the dismissal of the first defendant's counterclaim is premised on allegations of false representations by the plaintiff that caused the first defendant to suffer loss and damages. The plaintiff's cross-appeal before us is against a part of the decision of the learned judge who dismissed the plaintiff's claim for RM16 million against the first defendant.

Cross Appeal

Preliminary Objection

[23] The defendants/appellants have raised a preliminary objection (PO) against the plaintiff/respondent's cross-appeal on the following grounds.

[24] The defendants submit that it is now settled law that any cross-appeal must be restricted to vary only that part of the decision that was being appealed against and not any other parts of the decision that does not form

the subject of the appeal. Rule 8(1) of the Rules of the Court of Appeal 1994; *Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors* [2015] 3 CLJ 489; [2015] 4 MLJ 543 (Court of Appeal); *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 8 CLJ 149 (Federal Court). Thus the cross-appeal of the plaintiff is wrong in law and ought to be struck out.

[25] The defendants' appeal is only against a part of the decision of the learned judge, namely in respect of the learned judge's findings on the Kluang land as well as the first defendant's counterclaim. On the other hand, the plaintiff's cross-appeal is in respect of the learned judge's findings on the plaintiff's claim for RM16 million against the first defendant. Thus, the subject of the plaintiff's cross-appeal can only be pursued by filing a separate notice of appeal.

[26] In response to the defendants' objections' the plaintiff had relied on the case of *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2016] 4 CLJ 510, in support of their argument that as the issues in the main appeal and cross-appeal are interrelated, the cross-appeal is proper and competent to be brought with the main appeal.

[27] After due consideration of learned counsel's submissions and relevant authorities, we agreed with the submissions of learned counsel for the defendants that *Rajamani*'s case (*supra*) can be distinguished from the instant case. In addition, we are bound by the Federal Court's decision in *Leisure Farms* (*supra*). We therefore allowed the defendants' PO. We agreed with the submissions of the defendants that there was no competent cross-appeal before us. The plaintiff's cross-appeal was struck out.

The Main Appeal

[28] After careful consideration of learned counsel's written and oral submissions as well as the appeal records, we are of the view that there are merits in this appeal that warrant appellate intervention. We give our reasons as follows.

Sale And Purchase Or Security For A Loan?

[29] The learned judge had made findings that the plaintiff had signed both Forms 14A with full knowledge and there was no evidence that the plaintiff had been induced by representation by the defendants. Premised on such findings, the learned judge had taken a position that seems contrary to his findings abovementioned when he concluded that the transfer of the Kluang land to the first defendant was not pursuant to a genuine sale and purchase transaction between the plaintiff and the first defendant, but was a form of security for loans.

[30] There was cogent and credible evidence of a genuine sale and purchase transaction between the parties which the learned judge had failed to appreciate. Among them are these: The defendants had paid a total amount

of RM2,820,000 to the plaintiff. The relevant conveyancing documentation had been prepared by solicitors. They include the following: the sale and purchase agreement, two sets of Form 14A and the power of attorney.

[31] In addition, the plaintiff had executed the conveyancing documents in the presence of DW2 (Encik Mohd Faisul bin Lasri) and DW5 (Mr Edward Chin Chow Foo), both of whom are practising advocates and solicitors of the High Court of Malaya.

[32] DW2 had testified that he had witnessed the execution of the SPA and the Forms 14A by the plaintiff. DW2 had also attested the execution of the power of attorney by the plaintiff, and signed the certificate of authentication.

[33] In addition, DW5 had testified that he had explained the contents of the SPA to the plaintiff, and had witnessed the plaintiff signing the SPA and Forms 14A. DW5 had also testified that he had explained the contents of the power of attorney to the plaintiff and had witnessed the plaintiff signing the power of attorney.

[34] The sale and purchase transaction in respect of the Kluang land was concluded on 29 April 2008, and the IDT of the Kluang land was handed to the first defendant on the same day.

[35] From the facts and circumstances of the instant case, we are of the considered view that the transaction between the plaintiff and the first defendant was pursuant to a sale and purchase transaction in respect of the Kluang land. The MOA entered into between the parties was a separate transaction concerning Alam Rimba. The learned judge had failed to consider that the MOA made no reference whatsoever to the Kluang land. Thus, the learned judge had erred in his failure to appreciate that the transaction in respect of the Kluang land was separate and distinct from the MOA.

[36] The plaintiff's pleaded case was that the signatures of the plaintiff on the SPA and the Forms 14A were forged. In our view, the learned judge had made the correct finding that the plaintiff's allegation of forgery was unsubstantiated. Other than the first defendant's testimony that he had witnessed the plaintiff signing the Forms 14A, DW2 and DW5, two disinterested witnesses had testified to witnessing the signing of the SPA by the plaintiff. In the case *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 at 19B - 20G, the Federal Court had accepted the direct evidence of a disinterested witness as to the genuineness of the execution of a document.

[37] To prove the plaintiff's allegation of forgery of the plaintiff's signatures on the SPA and the power of attorney, the plaintiff's witness, PW2 (Encik Nor Hisham bin Hashim) testified that the disputed conveyancing documents had been submitted to the Department of Chemistry to verify the signatures on the disputed documents. However, the document examiner,

Encik Iskandar bin Azman was never called as a witness to testify on the authenticity of the signatures on the disputed documents. Neither was a report by Encik Iskandar tendered as evidence.

[38] In the circumstances, the learned judge was right to draw an adverse inference pursuant to s. 114(g) of the Evidence Act 1950 against the plaintiff when he failed to call Encik Iskandar as a witness or to produce Encik Iskandar's report.

[39] The learned judge was therefore correct in his finding that the signatures on the disputed conveyancing documents were the genuine signatures of the plaintiff.

[40] Since the learned judge had made the finding that the plaintiff's signatures on the SPA and the power of attorney were genuine and there was no evidence of misrepresentation by the first defendant to the plaintiff, the learned judge ought to have concluded that the transfer of the Kluang land from the plaintiff to the first defendant was valid and consequently, the subsequent transfer of the land to the second defendant was also valid. As a result, the second defendant had acquired indefeasible title to the land pursuant to s. 340 of the National Land Code.

Illegality

[41] The learned judge had made a finding that the transaction between the plaintiff and the first defendant was not a genuine sale and purchase transaction in respect of the Kluang land, but rather a loan transaction in which the plaintiff had transferred the Kluang land to the first defendant as security for loans provided by the first defendant to the plaintiff.

[42] On the assumption that the transaction abovementioned was a security for the loan, as was found by the learned judge, the transaction would be a money lending transaction. Thus, it would mean that the first defendant who is not a licensed moneylender would then run foul of s. 15 of the Moneylenders Act 1951 which provides as follows:

> No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable.

[43] The effect of s. 15 abovementioned is that any purported moneylending agreement between the plaintiff and the first defendant would be void for illegality. However, learned counsel for the defendants submitted that the learned judge had failed to appreciate the effect of his finding in relation to the abovementioned provision in the Moneylenders Act 1951. Learned counsel for the defendants submitted that if that were the case, since the transaction had been fully executed, the property to the Kluang land would effectively pass to the first defendant notwithstanding the illegality. In the case of *Sajan Singh v. Sardara Ali* [1959] 1 LNS 90; [1960] 26 MLJ 52, the Privy Council had made the observation that in respect of illegal agreements, "let the estate lie where it falls".

[44] However, since we have made the finding that the transaction involving the Kluang land is a genuine sale and purchase transaction between the plaintiff and the first defendant, and not a transaction in which the Kluang land was utilised as a security for loans from the first defendant to the plaintiff, the issue of moneylending does not arise.

[45] We therefore had allowed the appeal of the defendants and set aside the decision of the learned judge in respect of the Kluang land.

Counterclaim

[46] In his counterclaim before the High Court, the first defendant had alleged that the first defendant was induced by the plaintiff through various representations to invest in Alam Rimba. These representations were discovered to be false or fraudulently made. As a result of the false representations and fraud, the first defendant alleged that he had suffered loss and instituted the counterclaim to seek damages.

[47] The learned judge had dismissed the first defendant's counterclaim on the grounds that the subject had become academic. In his "grounds of judgment" it was stated, in sparse terms as follows:

> [12] Saya juga menolak tuntutan balas Defendan-defendan atas alasan perkara tersebut telah menjadi akademik.

There was no analysis of the subject matter of the counterclaim or reasons given by the learned judge as to the basis for arriving at the abovementioned conclusion.

[48] According to the submissions of learned counsel for the first defendant, the subject matter of the counterclaim is as follows: In 2008, the plaintiff had invited the first defendant to invest in a timber logging project. The plaintiff had represented to the first defendant that:

(i) Mutiararis Trading Sdn Bhd ("MTSB"), a company owned by the plaintiff, had obtained a timber concession from Kompleks Perkayuan Kelantan ("KPK") to extract timber from 10,000 acres of land ("plaintiff's first representation"); and

(ii) the said timber concession was a very lucrative investment because the concession area was filled with good quality timber ("plaintiff's second representation").

[49] The first defendant had relied on the plaintiff's first and second representations abovementioned and had agreed to invest in the said timber project. Monies were given by the first defendant to the plaintiff as investment in the timber project.

[50] Subsequently, the first defendant was made a director of MTSB and given 25% of the shareholding in MTSB. The first defendant continued to invest monies in the said timber project.

[51] It was only later that the first defendant discovered that the timber concession was not given to MTSB but to Alam Rimba. The plaintiff had explained to the first defendant that he had made a mistake and agreed to make the first defendant and subsequently the first defendant's wife as partners in Alam Rimba. After the first defendant was made a partner in Alam Rimba, the first defendant made further investment in the timber project.

[52] On 27 April 2009, the plaintiff and the first defendant entered into the MOA wherein the plaintiff guaranteed among others, that the first defendant could make a profit of not less than RM26 million by October 2009 from the timber concession.

[53] The first defendant had suffered loss and damages in reliance on the plaintiff's representations on the timber project. In particular, the first defendant had incurred the following expenses:

(i) payment of RM1.6 million to KPK for approval to enter certain parts of the concession areas;

(ii) payment of RM473,280 to the Forestry Department of Kelantan to pave the path leading to the concession area and payment of premiums;

(iii) payment of RM50,000 as legal fees for the agreement between Alam Rimba and KPK for the timber concession; and

(iv) purchase of various machineries and equipment for the purpose of extracting timber.

[54] In response to the first defendant's counterclaim, the plaintiff's submissions can be summarised as follows: There was no misrepresentation on the part of the plaintiff or any inducement by the plaintiff that was relied on by the first defendant in his decision to invest in the timber project. The first defendant was made a partner of MTSB and later Alam Rimba and was in a position to verify details of the timber concession and the quality of the timber with KPK but had failed to do so.

[55] In our considered view, the learned judge had failed to give due consideration to the first defendant's counterclaim before dismissing it as academic. The learned judge had failed to evaluate the oral and documentary evidence adduced by the first defendant to support their counterclaim. Had the learned judge properly evaluated the evidence adduced before him, he would not have dismissed the counterclaim as he did. On the balance of probabilities, we are of the considered view that there is sufficient evidence to prove the first defendant's counterclaim. We had therefore allowed the counterclaim with costs and interest and order the assessment of damages to be undertaken by the same High Court Judge who had conducted the trial.

[56] To summarise, we had made the following orders:

(i) the plaintiff/respondent's cross-appeal is struck out with costs;

(ii) the defendants/appellants' main appeal in respect of the Kluang land is allowed with costs. The decision of the learned judge is set aside; and

(iii) the counterclaim of the first defendant/first appellant is allowed with costs and interest. The decision of the learned judge is set aside. The case is remitted to the same High Court Judge for assessment of damages.